

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> The facts and circumstances of the case as set forth in the Board's prior order are incorporated herein by reference. The relevant facts are as follows.

On April 29, 1999 appellant, then a 19-year-old material handler, filed a traumatic injury claim (Form CA-1) alleging that on April 28, 1999 she sustained an injury when a piece of metal broke off the gears of a door and hit her head while she was in the performance of duty. She described her claimed injury as a "top of my head cut" and advised that the injury required seven stitches. Appellant did not stop work.<sup>3</sup> In an April 28, 1999 report, Dr. Thomas Beach, a Board-certified family practitioner and employing establishment physician, indicated that appellant reported that a piece of metal from a door fell 30 feet onto the top of her head that same day.

By decision dated October 21, 1999, OWCP found that appellant had established the occurrence of the April 28, 1999 employment incident, as alleged. However, it further found that the medical evidence of record was insufficient to establish a diagnosis in connection with the accepted April 28, 1999 employment incident.

On March 27, 2003 appellant filed a notice of recurrence (Form CA-2a) for medical treatment and time lost due to disability from work. She advised that the date of the claimed recurrence was September 10, 2002. Appellant noted that she had returned to her attending physician several times for treatment of headaches and indicated that, on September 10, 2002, she was working in very hot conditions and had to go home immediately after she bent over to remove her boots and could not stand erect.<sup>4</sup>

By decision dated July 14, 2005, OWCP denied appellant's recurrence claim, noting that there could be no recurrence of her denied claim.

On January 16, 2013 appellant filed an occupational disease claim (Form CA-2) alleging that she sustained employment-related vertigo, hearing loss, and tinnitus.<sup>5</sup> OWCP assigned the

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<sup>2</sup> *Order Remanding Case*, Docket No. 13-1775 (issued May 22, 2014).

<sup>3</sup> OWCP assigned the claim OWCP File No. xxxxxx820.

<sup>4</sup> OWCP created a new claim file assigned OWCP File No. xxxxxx741. By decision dated March 30, 2004, it denied appellant's claim in OWCP File No. xxxxxx741, finding that she had not submitted sufficient evidence to establish her claim as she had not responded to a request for additional evidence. On April 12, 2004 appellant, through her then counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on January 25, 2004. By decision dated June 22, 2005, OWCP's hearing representative set aside the March 30, 2004 decision and remanded the case to OWCP for further development. She noted that appellant was claiming that her current condition was due to an April 28, 1999 employment injury which had been denied and indicated that, therefore, OWCP had erred in creating a new claim file under OWCP File No. xxxxxx741. The hearing representative directed OWCP to delete OWCP File No. xxxxxx741 as a separate claim file and to combine the contents of OWCP File Nos. xxxxxx741 and xxxxxx820 under the latter file number. She noted that, after combining the contents of the files, OWCP should issue a denial of appellant's recurrence claim because her earlier claim for an April 28, 1999 injury had not been accepted.

<sup>5</sup> Appellant was working as an inventory management specialist when she filed the Form CA-2.

claim OWCP File No. xxxxxx795. Appellant asserted that these conditions had progressed slowly after she sustained a head injury due to an accident at work on April 28, 1999. She maintained that the accident broke her inner ear bones and caused her to suffer a loss of hearing and associated problems. Appellant identified November 11, 2002 as the date she first became aware of her condition and first realized its relation to her federal employment. She did not stop work.

Appellant submitted several notification of personnel action forms (Form SF-50) which detailed personnel actions related to positions she held with the employing establishment since the late-1990s, including the positions of materials handler, equipment cleaner, and inventory management specialist. She submitted a job description for the equipment cleaner position which noted that the position required using machines, such as sanders and high-pressure spraying units, to clean aircraft parts.

In a February 1, 2013 development letter, OWCP advised appellant that the documentation received to date had been reviewed and was deemed insufficient to support her claim because it was “not sufficient to support that you provided timely notification of your work injury,” was “not sufficient to establish that you actually experienced the employment factor(s) alleged to have caused injury,” and was “not sufficient to support that you were injured while performing any duty of your employment.” It requested that she complete and return an enclosed development questionnaire within 30 days. The questionnaire requested that appellant list her employment history by employer, job title, and inclusive dates, including all employment (federal and non-federal) as well as military service. Appellant was asked, for each job title, to describe the sources of noise, number of hours of exposure per day, and use of any safety devices to protect against noise exposure. OWCP also asked her to describe all previous hearing problems and to submit copies of medical reports and audiograms concerning her hearing. It afforded appellant 30 days to respond.

In a separate letter of even date, OWCP asked the employing establishment to provide comments from a knowledgeable supervisor on the accuracy of all statements provided by appellant regarding her claim. It requested that the employing establishment provide detailed information regarding appellant’s exposure to hazardous noise in the workplace, including the locations of worksite noise exposure, sources of exposure, number of hours of exposure per day, decibel levels/frequencies of exposure, and use of any safety devices to protect against exposure. OWCP also requested that the employing establishment provide copies of medical examinations pertaining to appellant’s hearing or ear problems. It afforded the employing establishment 30 days to respond.

On February 11, 2013 appellant responded to OWCP’s development letter, asserting that she had reported her April 28, 1999 injury twice in 1999 as well as in 2002, 2006, 2009, 2011, 2012, and 2013. She noted that the April 28, 1999 injury “caused my loss of hearing/ear problems.” Appellant submitted a record of injury/illness and treatment dated April 29, 1999 in which a medical officer with an illegible signature noted that, on the previous day, a part of a door had broken off and a piece of metal fell, hitting appellant on the head. She also submitted employment records (supplemented by her handwritten annotations) showing that she worked in various positions for the employing establishment, including working as a materials handler from August 1998 to October 1999 where she operated forklifts in a warehouse, as a sheet metal mechanic from October 2000 to March 2002 and November 2002 to September 2003 where she

worked in a “very loud” environment wearing only sponge earplugs, as an equipment cleaner from March to November 2002 where she operated an “aqua mister,” and as a supply clerk/technician from September 2003 to September 2005 and July 2007 to August 2009 where she worked in an airplane hangar wearing earplugs only part of the time.

Appellant submitted a November 22, 2002 report from Dr. Subhi Sulieman, a Board-certified internist, who indicated that appellant reported that she was injured in 1999 when a part of a gear box from a door fell and struck her in the head. Dr. Sulieman noted that appellant reported that she suffered a concussion and a broken bone in her inner ear due to this accident and that she consequently had extreme vertigo.

Appellant submitted the results of September 30, 2002 and May 28, 2003 audiograms obtained from a private health care provider. She also submitted a June 17, 2003 report from Dr. Christina Mayville, Board-certified in neurology, who noted that appellant related her vertigo and ear pain to a 1999 incident at work when a gear box from a door fell on her head.

In a letter dated April 8, 2013, the employing establishment controverted appellant’s claim, noting that she had attributed her conditions to her previously denied claim for an April 28, 1999 injury. In an attached May 10, 2012 online mishap report, appellant advised that, on that date, her right arm went numb all the way to her fingers. She asserted that she had chronic nerve damage from a gearbox falling 30 feet onto her head. Appellant claimed that she had permanent vertigo and ringing in her ears.

By decision dated June 10, 2013, OWCP denied appellant’s occupational disease claim finding that it was untimely filed. It noted that she had not filed her claim within three years of the date of injury or demonstrated that her immediate supervisor had actual knowledge within 30 days of the claimed date of injury, *i.e.*, November 11, 2002.

On June 24, 2013 appellant requested reconsideration of OWCP’s June 10, 2013 decision.

By decision dated July 3, 2013, OWCP denied appellant’s request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

On July 22, 2013 appellant appealed OWCP’s June 10 and July 3, 2013 decisions to the Board. By order dated May 22, 2014,<sup>6</sup> the Board set aside OWCP’s June 10 and July 3, 2013 decisions and remanded the case to OWCP for clarification, to administratively combine appellant’s case records, and appropriate adjudication of the issues presented.

In an undated memorandum added to the case record on June 11, 2014, an OWCP claims examiner indicated that she had added relevant decisions from OWCP File No. xxxxxx820 to OWCP File No. xxxxxx795.

By decision dated October 22, 2014, OWCP denied appellant’s occupational disease claim under OWCP File No. xxxxxx795, noting that she was claiming injury as a consequence of a

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<sup>6</sup> *Supra* note 2.

claimed April 28, 1999 injury which had previously been denied. It indicated that there could be no consequential injury of a claim not accepted by OWCP.

In a letter dated October 22, 2014, OWCP informed appellant that she had not submitted sufficient evidence to establish that she actually experienced the employment factors alleged to have caused her January 16, 2013 claim for vertigo, hearing loss, and tinnitus. It requested that she respond to a questionnaire, which asked her to provide information regarding the employment factors alleged to have contributed to her claimed medical conditions. The questionnaire posed questions regarding whether appellant was still exposed to hazardous noise at work and whether she had hobbies which involved exposure to loud noise. Appellant was asked to identify the date she first noticed her hearing loss and the date she first related her hearing loss to work exposure and to explain why she realized her hearing loss was related to work exposure. OWCP afforded her 30 days to respond, but she did not respond within the afforded period.

In a memorandum dated October 27, 2014, a claims examiner noted that OWCP File No. xxxxxx820 had been administratively combined with OWCP File No. xxxxxx795, with the latter file designated as the master file.

By decision dated December 18, 2014, OWCP again denied appellant's claim, finding that she had not submitted sufficient factual evidence to establish her occupational disease claim for vertigo, hearing loss, and tinnitus. It noted that she had not responded to its development letter.

On January 22, 2015 appellant requested a review of the written record before a representative of OWCP's Branch of Hearings and Review.

By decision dated February 9, 2018, OWCP's hearing representative affirmed the December 18, 2014 decision finding that appellant had not established the factual aspect of her claim for an employment-related occupational disease.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>7</sup> has the burden of proof to establish that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.<sup>8</sup> These are the essential elements of every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>9</sup>

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) a factual statement identifying

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<sup>7</sup> *Supra* note 1.

<sup>8</sup> *K.V.*, Docket No. 18-0947 (issued March 4, 2019); *M.E.*, Docket No. 18-1135 (issued January 4, 2019); *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

<sup>9</sup> *K.V. and M.E., id.*; *Elaine Pendleton*, 40 ECAB 1143 (1989).

employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the identified employment factors.<sup>10</sup>

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.<sup>11</sup> A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.<sup>12</sup> Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s).<sup>13</sup>

### ANALYSIS

The Board finds that the case is not in posture for decision.

The Board finds that OWCP has not adequately developed appellant's occupational disease claim for employment-related vertigo, hearing loss, and tinnitus. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the factual evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.<sup>14</sup>

First, the Board notes that, despite OWCP's failure to accept any employment factors when denying appellant's occupational disease claim, appellant has established an employment factor in the form of the April 28, 1999 incident at work when a piece of metal from a door fell and hit the top of her head. The case record contains evidence establishing that appellant consistently described the details of the April 28, 1999 incident and expressed her belief that it contributed to her vertigo, hearing loss, and tinnitus, and furthermore, it is noted that OWCP has already accepted the April 28, 1999 incident as factual in connection with OWCP File No. xxxxxx820.<sup>15</sup>

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<sup>10</sup> *R.G.*, Docket No. 19-0233 (issued July 16, 2019). *See also Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>11</sup> *W.M.*, Docket No. 14-1853 (issued May 13, 2020); *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

<sup>12</sup> *M.V.*, Docket No. 18-0884 (issued December 28, 2018).

<sup>13</sup> *Id.*; *Victor J. Woodhams*, *supra* note 10.

<sup>14</sup> *See M.H.*, Docket No. 19-0930 (issued June 17, 2020); *L.L.*, Docket No. 12-0194 (issued June 5, 2012); *N.S.*, 59 ECAB 422 (2008).

<sup>15</sup> Moreover, the case record contains a record of injury/illness and treatment dated April 29, 1999 in which a medical officer for the employing establishment noted that, on the previous day, a part of a door had broken off and a piece of metal fell, hitting appellant on the head. The Board notes that OWCP File No. xxxxxx820 (concerning appellant's prior claim implicating the April 28, 1999 incident) has been administratively combined with OWCP File No. xxxxxx795 (under which the present occupational disease claim was originally filed).

In addition, the case record contains evidence which suggests additional sources for appellant's vertigo, hearing loss, and tinnitus, including exposure to hazardous noise in the workplace. Appellant submitted employment records showing that she was employed in several jobs with the employing establishment between the late-1990s and late-2000s where she was exposed to hazardous noise. These employment records show that the jobs included working as a materials handler where appellant operated forklifts in a warehouse, as a sheet metal mechanic where she worked in a very loud environment wearing only sponge earplugs, as an equipment cleaner where she operated a cleaning machine, and as a supply clerk/technician where she worked in an airplane hangar wearing earplugs only part of the time.<sup>16</sup>

The Board finds that, despite the above-noted evidence submitted by appellant, OWCP has not adequately developed the factual aspect of her occupational disease claim. OWCP denied appellant's occupational disease claim on a factual basis without adequately considering the evidence she submitted and without making an adequate attempt to obtain additional information concerning employment factors (particularly regarding noise exposure) from the employing establishment. OWCP requested that the employing establishment submit a detailed statement regarding whether appellant was exposed to hazardous noise in the workplace. However, OWCP did not receive a response from the employing establishment which fully complied with this request and the case record does not indicate that OWCP made any further attempts to obtain the requested information from the employing establishment.

For these reasons, the case shall be remanded to OWCP for the purpose of obtaining from the employment establishment a detailed statement regarding hazardous noise exposure in the workplace during the relevant periods which describes appellant's job titles and inclusive dates.<sup>17</sup> For each job title, the employing establishment shall describe the sources/types of noise exposure, the length and periods of such exposure (including the number of hours of exposure per day/week), and the use of safety devices, if any, to protect against noise exposure.<sup>18</sup> OWCP shall also afford appellant an opportunity to provide additional details regarding employment factors she believes contributed to the claimed occupational diseases of vertigo, hearing loss, and tinnitus.

After carrying out this development, OWCP shall issue a *de novo* decision regarding appellant's occupational disease claim for employment-related vertigo, hearing loss, and tinnitus.

### **CONCLUSION**

The Board finds that the case is not in posture for decision.

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<sup>16</sup> Appellant also submitted copies of September 30, 2002 and May 28, 2003 audiograms.

<sup>17</sup> See *supra* note 16. See also *G.I.*, Docket No. 19-0942 (issued February 4, 2020), *R.A.*, Docket No. 17-1030 (issued April 16, 2018).

<sup>18</sup> The Board notes that OWCP regulations and the FECA procedure manual provide that, in the absence of a reply from the employing establishment, OWCP may accept the allegation of a claimant as factual -- if the claimant's statement is sufficiently clear and detailed as to matters of which he or she is knowledgeable. See 20 C.F.R. § 10.117(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.10(a) (June 2011). See also *J.C.*, Docket No. 15-1517 (issued February 25, 2016).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 9, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: August 3, 2020  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Christopher J. Godfrey, Deputy Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board